TABLE OF CONTENTS

Page

ARGUMENT 1

I. There Is No Justification For The District Court's Impetuous Decision And Ill-Considered Plan. 2

II. The District Court's Misuse Of Its Judicial Power Requires Reversal. 7

CONCLUSION 10

CERTIFICATE OF SERVICE 11

In The

Supreme Court of the United States

No. 71-373

CITY OF VIRGINIA BEACH,
Appellant,

v.

HENRY E. HOWELL, JR., ET AL.,
Appellees.

and

CITY OF VIRGINIA BEACH,
Appellant,

v.

STANFORD E. PARRIS, ET AL.,
Appellees.

and

CITY OF VIRGINIA BEACH,
Appellant,

v.

CLIVE L. DuVAL, II, ET AL.,
Appellees.

On Direct Appeal from the United States District Court
for the Eastern District of Virginia

REPLY BRIEF FOR THE APPELLANT

The arguments of appellees DuVal, Howell and the City of Norfolk will not withstand analysis in terms of the facts, legal precedents, and the policy considerations involved in this appeal. Without discussing each argument seriatim or unnecessarily repeating arguments made in its opening brief, the City of Virginia Beach will explain why this is so—first, with regard to the District Court's holding and plan; secondly, with regard to the misuse of its judicial power.

I.

There Is No Justification For The District Court's Impetuous Decision And Ill-Considered Plan.

The appellant's position is that a state reapportionment plan should be tested, not solely on the basis of numerical comparisons among districts, but also in terms of the quality of representation it affords to the people. Equal representation is not guaranteed simply because districts have been arbitrarily drawn to contain an identical number of persons.

As our opening brief makes clear, this Court's *state* reapportionment decisions support this view. (Brief of Appellant at 9-18). This Court has never interpreted the Equal Protection Clause as requiring precise mathematical equality among state legislative districts to the exclusion of all other factors. In *Reynolds* v. *Sims*, 377 U.S. 533, 565-66, 577 (1964), the Court recognized that "the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative reapportionment" and that "[m]athematical exactness or precision is hardly a workable constitutional requirement." Consideration may be given to factors other than population which affect the quality of representation, such as integrity of political subdivisions, community interests and geography. If the Equal Protection Clause is ever interpreted as requiring such factors to be ignored and thus reducing state reapportionment to a simplistic mathematical exercise, rational policy-making will be precluded and reapportionment will then become a science, not an art.* Reapportionment will no longer be a matter "for legislative consideration and determination." *Id.* at 586.

Affirmance of the District Court's decision would mean

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* Plato recognized centuries ago in Chapter III of the *Republic* that governing is an art, not a science.

that mathematical computations, such as population deviation percentages and population variance ratios, are the sole test of compliance with the Equal Protection Clause. But bald mathematical figures are not accurate indexes of equal representation. They can be quite misleading, as so dramatically demonstrated in the case of Virginia Beach.* To correct the 7.3% deviation in its House district, 29,136 of its citizens were transferred to Norfolk's House district where they now vote with the 307,951 citizens of Norfolk for seven delegates who speak for Norfolk. Undeniably, this transfer has resulted in greater *mathematical* equality, for the deviation was reduced to 0.2%. But the quality of representation afforded these citizens has been lost. They can no longer vote with their fellow Virginia Beach citizens with whom they share community interests.

Similarly, no political advantage was gained by any of the Virginia voters who, because they would be mathematically "underrepresented" voting with the other residents of their community, now must vote for delegates representing other counties and cities. Besides creating slightly more mathematical equality among House districts, the exercise by the District Court of its judicial power over the General Assembly accomplished nothing. *Who* a person has an opportunity to vote for can be as important as *how much* his vote is theoretically worth.

The General Assembly's House plan came as close as possible to mathematical equality while maintaining the integrity of the community interests shared by residents of the same political subdivisions. Unable to contradict this critical fact, DuVal argues that Virginia has abandoned its long tradition of respecting the integrity of political subdivisions.

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* Maximum population variances, such as the 16.4% (or 23.6%) variance in Virginia's House plan, are especially misleading since they focus on the extremes within a plan, not on its overall equality. (See Brief of Appellant at 19.)

This argument totally ignores the policy evidenced by the General Assembly's plan, and its authority to develop policy consistent with its constitutional duty to implement it in a way that will not submerge population as the controlling criterion. For example, the General Assembly had to provide that a city's annexation of additional territory would have no effect on House district lines; otherwise the population in the districts involved would be thrown out of proportion.

Appellees' arguments cannot overcome the fact that in reapportioning the Virginia House of Delegates, the General Assembly continued to maintain the integrity of political subdivisions. Admittedly, the plan resulted in some deviation from precise mathematical equality.* The question, however, is not whether other district courts have overturned state plans characterized by larger or smaller population variance percentages. The question is whether the slight population inequality, which was the unavoidable result of respecting political subdivision lines in Virginia, renders *its* plan unconstitutional.

This question was not answered by the District Court, nor do the appellees attempt to answer it now. They take the position that there is a mystical percentage variation above which any state reapportionment plan is unconstitutional. They have pinpointed the maximum permissible variation at somewhere between the 10.3% variation in the District Court's plan (which they argue is constitutional) and the 16.4% (or 23.6%) variation in the General Assembly's plan (which they contend is unconstitutional). Since no consideration need be given to whether a plan gives voters

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* Appellee DuVal makes much of the fact that under his method of calculating the deviation in one floater district, the total variance in the House plan was 23.6%—not the 16.4% figure used in our opening brief. We simply adopted the figure used by the District Court in holding the General Assembly's plan unconstitutional. 330 F.Supp. at 1139.

an effective and meaningful voice in the selection of representatives, this approach does have one merit—it facilitates judicial review of reapportionment plans. But simplicity in the law is not a benefit when it results in oversimplification of complex issues.

While political subdivisions in Northern Virginia were underrepresented under the General Assembly's House plan, the area as a whole was overrepresented in the Senate and Congress. For example, Prince William County's underrepresentation in the House of Delegates is compensated for by its 4.4% overrepresentation in the Senate. These facts have been ignored by DuVal in his arbitrary selection of one region to compare with another, and by the District Court despite this Court's statement or more than one occasion that consideration of the overall effect of representation in both houses of a bicameral state legislature is "indispensable." *Burns* v. *Richardson,* 384 U.S. 73, 82 (1966); *Maryland Committee* v. *Tawes,* 377 U.S. 656, 673 (1964).

As a result of the District Court's transfer to Northern Virginia of one floater delegate shared by Virginia Beach, all political subdivisions in the Tidewater area are now underrepresented in the House of Delegates by an average of 3.4%. The only significant effect of this transfer was to change which area is discriminated against in the House of Delegates. Northern Virginia is certainly no longer the subject of discrimination. It is difficult to understand how the Equal Protection Clause could have required the District Court to upset the General Assembly' plan in order to give the area overrepresentation in both the House and Senate.

In holding the General Assembly's plan unconstitutional, the District Court looked no farther than its 16.4% total variation. It did not consider whether this variation would

make possible a more meaningful vote for the citizens of Virginia. In transferring a delegate from Tidewater to Northern Virginia, it looked no farther than the statistical data selectively presented by the appellees, not at the overall representation of Northern Virginia. In *Kelly* v. *Bumpers,* 340 F.Supp. 568 (E.D. Ark. 1972), a district court in Arkansas was faced with a similar situation in which the court could have used its powers to produce somewhat more mathematical equality by changing district lines here and there. But the court was not concerned solely with mathematical exactness; it also considered the important factor of effective representation for people who shared community interests. The court refused to sacrifice community interest for the sole purpose of achieving mathematical exactness, stating:

> "Similarly, revising district lines to increase the population of some small districts would hardly produce constitutional advantages to the people involved comparable to the practical disadvantages that the revisions would entail." 340 F.Supp. at 582.

Constrasting that court's judicious approach to reapportionment with the heavy-handed and simplistic method employed by the District Court in disposing of the General Assembly's plan demonstrates the error below. The Arkansas court recognized that there is more to equal representation than mere numbers, that no reapportionment plan can be perfect, and that a court should not invalidate a legislative plan because some enterprising plaintiff can demonstrate that it has certain faults. The court said:

> "We think it obvious that no plan can be devised for the apportionment of the Arkansas Legislature that will suit all interested individuals and groups, and that probably no plan can be devised that is free from defects or upon which improvements could not be made." 340 F.Supp. at 586.

II.

The District Court's Misuse Of Its Judicial Power Requires Reversal.

Appellees would have this Court disapprove a carefully conceived legislative plan that contains only so much deviation from mathematical equality as necessary to preserve the integrity of political subdivisions and approve a court-prepared plan containing only slightly less variation while destroying the integrity of political subdivisions. But they also ask this Court to condone the manner in which the court prepared its plan without holding any hearing whatsoever and without giving the General Assembly any opportunity to prepare a plan acceptable to the court. Such a use of judicial power is indefensible.

The City of Norfolk contends that Virginia Beach has no "status" to object to the District Court's plan because it did not attempt to raise the issue of reapportionment until after the District Court filed its order on July 2, 1971. But how can Virginia Beach be estopped from making arguments on appeal that it never was afforded an opportunity to make below? It was only after the court issued its order declaring the General Assembly's plan unconstitutional and substituting its own plan in one bold judicial tour de force that Virginia Beach had any idea that its representation was to be altered. The portion of the District Court's plan which so dramatically affects Virginia Beach—the inclusion of 29,136 of its citizens in Norfolk's seven-member House district—was not a remedy sought by any of the parties. It was not considered or even mentioned during trial of the case. There was no invitation by the court for parties to submit suggested plans, no hearing on the merits of the court's plan and no advance notice of what it contained.

Appellees Howell and DuVal persist in depicting the General Assembly as unreasonably obstinate—defiantly clinging to an unconstituional plan in the face of all reason. On the contrary, any disinterested person would be amazed at the extreme deference accorded by the General Assembly to the District Court and at the corresponding lack of comity demonstrated by the court's refusal to remand the case for preparation of a new plan.

Howell's statements that the State "failed to comply with the Court's order" (Brief of Howell at 11) and that the General Assembly was "given a second chance" (Brief of Howell at 24) find no support whatsoever in the record. DuVal calls the General Assembly "stubbornly resisting" because it refused to change its "unconstitutional" House plan "despite repeated warnings by appellee DuVal." (Brief of DuVal at 28-29). A similar contention was made by Howell in his Motion to Affirm. (Motion to Affirm of Howell at 4-5). These statements should be recognized for what they are—self-serving arguments by members of the General Assembly who were unable to convince their fellow assemblymen to adopt their plans. The General Assembly was certainly not required to accept Howell and DuVal as final arbiters of the meaning of the United States Constitution.

The record demonstrates unquestionably that the General Assembly was standing by for the sole purpose of remedying any defects in its plan and that the District Court did not give the General Assembly any opportunity to prepare an acceptable plan after holding the plan unconstitutional. (See Appendix, Reply Brief of Appellants in No. 71-364.) And surely it was not incumbent on the General Assembly to submit, on its own initiative, alternative plans in anticipation that the court might hold its plan unconstitutional.

DuVal argues that "time was of the essence." But it took the District Court 16 days (from June 16 until July 2) to

announce its decision and prepare its own plan. Certainly the court could have announced its holding more expeditiously and given the General Assembly some limited time to prepare a plan. Moreover, there was no reason why the plan had to be implemented by July 2. The court had already postponed the date of the primary elections. It could have postponed them further, postponed the effect of the sixty-day filing rule for candidates, or even permitted the elections to be held under the General Assembly's plan with directions that a new plan be prepared for all subsequent elections. The fact remains that had the District Court seen fit to give the General Assembly an opportunity to prepare a new plan, there was nothing to prevent it from doing so.

In arguing that the failure of the General Assembly to enact a new plan after the decision below constitutes an acceptance of the court's plan, DuVal fails to take into account several considerations. The first is that the General Assembly was not convinced of the correctness of the District Court's decision—it resolved to pursue this appeal. Secondly, under the law as interpreted by the District Court, the General Assembly would have had to ignore political subdivision lines in reapportioning the House of Delegates. Understandably, it did not want to abandon longstanding tradition, especially since no holding of this Court requires it. Moreover, had the General Assembly done so, it is almost a certainty that some disgruntled legislator or political interest group would have instituted a new suit attacking the constitutionality of the plan and the General Assembly would have been forced to defend its reapportionment all over again.

CONCLUSION

The District Court's holding should be reversed and Virginia's plan for the reapportionment of the House of Delegates and Senate reinstated. If this Court should find the General Assembly's plan unconstitutional, it should not allow the District Court's plan to stand, but should either remand the case with directions that the General Assembly be permitted an opportunity to prepare a new reapportionment plan under meaningful standards determined by this Court or remand with directions that the case be reopened and the City of Virginia Beach be permitted an opportunity to be heard on the formation of a new reapportionment plan.

Respectfully submitted,

HARRY FRAZIER, III
HUNTON, WILLIAMS, GAY
& GIBSON
700 East Main Street
Richmond, Virginia 23219
Counsel for Appellant

J. DALE BIMSON
City Attorney
Municipal Center
Virginia Beach, Virginia 23456

JOHN B. ASHTON
DANIEL A. CARRELL
HUNTON, WILLIAMS, GAY
& GIBSON
700 East Main Street
Richmond, Virginia 23219
Of Counsel

Dated: December 6, 1972

CERTIFICATE OF SERVICE

I, Harry Frazier, III, counsel for the Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Reply Brief for the Appellant in the United States Mails, first class postage prepaid, this 6th day of December, 1972, addressed to:

The Hon. Henry E. Howell, Jr.
808 Maritime Tower
Norfolk, Virginia 23510

Leonard H. Davis, Esq.
City Attorney—Norfolk
City Hall Bldg., Room 908
Norfolk, Virginia 23501

The Hon. Clive L. DuVal, II, Esq.
2007 N. 15th Street
Arlington, Va. 22216

The Hon. Andrew P. Miller
Attorney General of Virginia
Supreme Court–Library Building
Richmond, Virginia 23219

and by depositing one copy of the foregoing Reply Brief for the Appellants in the United States Mails, first class postage prepaid, this 6th day of December, 1972, addressed to Armand Derfner, Esq., 5200 Woodward Bldg., 733 15th Street, N.W., Washington, D. C. 20005; The Hon. James M. Thomson, P.O. Box 1138, Alexandria, Virginia 22313; Edmund D. Campbell, Esq., 1425 H Street, N.W., Suite 822, Washington, D. C. 20005; The Hon. Stanford E.

Parris, 4085 Chain Bridge Road, Fairfax, Virginia 22030; C. Stanley Dees, Esq., 314 North Pitt Street, Alexandria, Virginia 22314; Robert L. Weinberg, Esq., 1000 Hill Building, Washington, D. C. 20006; Joseph H. Campbell, Esq., Commonwealth's Attorney of Norfolk, P.O. Box 1531, Norfolk, Virginia 23501; R. F. Horan, Jr., Esq., Commonwealth's Attorney of Fairfax County, Fairfax, Virginia 22030; The Hon. Peter K. Babalas, 210 Rotunda Building, Norfolk, Virginia 23510; The Hon. Henry L. Marsh, III, Hill, Tucker and Marsh, 214 East Clay Street, Richmond, Virginia 23219; Benjamin W. Dulany, Esq., 822 Southern Building, Washington, D. C.; C. V. Spratley, Jr., Esq., P.O. Box 575, Newport News, Virginia 23607; and David L. Norman, Esq., Acting Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D. C. 20530.

HARRY FRAZIER, III
Counsel for the City of Virginia Beach